Supreme Court, U.S.
F I L E D
JAN 4 1991
CLERK

No. 89-1632

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

v.

HODARI D.

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

CLOSING BRIEF FOR PETITIONER

JOHN K. VAN DE KAMP
Attorney General
RICHARD B. IGLEHART
Chief Assistant Attorney General
JOHN H. SUGIYAMA
Senior Assistant Attorney General
MORRIS BEATUS
Deputy Attorney General
RONALD E. NIVER
Deputy Attorney General
[Counsel of Record]

455 Golden Gate Avenue, Room 6200
San Francisco, California 94102
Telephone: (415) 557-2653
Attorneys for Petitioner

TABLE OF CONTENTS

	Page
ARGUMENT	
I. RESPONDENT WAS NOT SEIZED WITHIN THE MEANING OF THE FOURTH AMENDMENT.	1
A. Elements of a Seizure.	2
B. Petitioner's Test Provides a Bright Line and Is Faithful to the Fourth Amendment.	10
C. Respondent's Rule Would Not Significantly Deter Police Misconduct.	12
II. THE ABANDONMENT OF THE COCAINE WAS NOT THE FRUIT OF THE POISONOUS TREE.	17
CONCLUSION	22

TABLE OF AUTHORITIES

CASES	Page
Alderman v. *United States* 394 U.S. 165 (1969)	18
Baker v. *McCollan* 443 U.S. 137 (1979)	6
Brower v. *County of Inyo* ___ U.S. ___, 103 L.Ed.2d 628 (1989)	5-10, 19
Brown v. *Illinois* 422 U.S. 589 (1935)	17, 18
Cady v. *Dombrowski* 413 U.S. 433 (1973)	14
California v. *Cirado* 476 U.S. 207 (1986)	4
California v. *Greenwood* 486 U.S. 35 (1988)	4
Connecticut v. *Barrett* 479 U.S. 523 (1987)	21
Dow Chemical Co. v. *United States* 476 U.S. 227 (1986)	4
Dunaway v. *New York* 442 U.S. 189 (1979)	18
Florida v. *Riley* 488 U.S. 445 (1989)	4

TABLE OF AUTHORITIES (cont.d)

CASES	Page
Florida v. *Royer* 460 U.S. 491 (1983) (plurality opinion)	3
Graham v. *Connor* ___ U.S. ___, 104 L.Ed.2d 443 (1989)	6
Hester v. *United States* 265 U.S. 57 (1924)	19, 20
INS v. *Delgado* 466 U.S. 210 (1984)	3
Katz v. *United States* 389 U.S. 347 (1967)	4
Lanier v. *South Carolina* 474 U.S. 25 (1985)	18
Malley v. *Briggs* 475 U.S. 335 (1986)	6
Michigan v. *Chesternut* 486 U.S. 567 (1986)	2-4, 9, 16
Miranda v. *Arizona* 384 U.S. 436 (1966)	18
New York v. *Harris* 110 S.Ct. 1640 (1990)	21
Oliver v. *United States* 466 U.S. 170 (1984)	5, 19

TABLE OF AUTHORITIES (cont.d)

	Page
CASES	
Rakas v. *Illinois* 439 U.S. 128 (1978)	5
Silverthorne Lumber Co. v. *United States* 251 U.S. 385 (1920)	20
Sumner v. *Mata* 449 U.S. 539 (1981)	12
Taylor v. *Alabama* 457 U.S. 687 (1982)	18
Terry v. *Ohio* 392 U.S. 1 (1968)	2, 3, 5, 6, 9, 10, 13, 15
United States v. *Ceccolini* 435 U.S. 268 (1978)	21
United States v. *Dionisio* 410 U.S. 1 (1973)	14
United States v. *Knotts* 460 U.S. 276 (1983)	14
United States v. *Mendenhall* 446 U.S. 544 (1980)	2-6, 8, 10
United States v. *Place* 462 U.S. 696 (1983)	8
Wong Sun v. *United States* 371 U.S. 471 (1963)	20, 21

STATUTES AND OTHER AUTHORITIES

United States Code	
Title 28, § 2254(d)	12
Title 42, § 1983	6
Other Authorities	
3 LaFave, Search and Seizure § 9.2(h) pp. 39-40 (2d.Ed. 1987, Supp. 1990)	6
1 LaFave, *supra*, § 2.1(d), at pp. 313-314	12
3 LaFave, *supra*, § 9.4,	15
A. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.L.Rev. 349, 403 (1974)	12

No. 89-1632

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

v.

HODARI D.

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

CLOSING BRIEF FOR PETITIONER

ARGUMENT

I.

RESPONDENT WAS NOT SEIZED WITHIN THE MEANING OF THE FOURTH AMENDMENT.

Respondent and his *amici* assert that he was seized under the Fourth Amendment when he saw Officer Pertoso running toward him on Foothill Boulevard in Oakland on the evening of April 18, 1988. They contend that this Court's cases do not require physical control of the citizen as a necessary element of a personal seizure;

indeed, they insist that this Court decisively rejected that requirement in *Michigan* v. *Chesternut*, 486 U.S. 567 (1986). They suggest that the "brightline" requirement of physical control is not bright at all, but would add a confusing element to the test enunciated in *United States* v. *Mendenhall*, 446 U.S. 544 (1980). They contend that the "restraint upon liberty" required by *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968), as an element of a personal seizure need not completely immobilize the person; it is sufficient if the officer controls the direction or speed of his movement. Finally, respondent and *amici* urge that this Court must reject petitioner's view of the seizure clause of the Fourth Amendment because it would encourage police to chase citizens in the streets without requisite cause to detain them. Such conduct, if left unregulated by the Fourth Amendment, would impinge upon the privacy and personal security of every citizen while traveling on the public streets. Petitioner respond to these arguments in turn.

A. Elements of a Seizure.

Since this Court's decision in *Terry* v. *Ohio*, *supra*, a seizure has been composed of two distinct elements: (1) restraint upon the liberty of a person; and (2) official action -- either physical force or show of authority -- which effects that restraint. *Id.* at 19 n.16. Both elements must be present to implicate the provisions of the Fourth Amendment. A show of authority without a consequent restraint is not a seizure; likewise, a citizen's decision not to leave the presence of a police officer who has not asserted his authority is not a seizure.

Since their identification in *Terry*, these elements have required explication. The use of force is an easily ascertainable fact, but it was not clear what constituted a show of authority. This Court rejected a test which would have required an inquiry into the subjective intent and belief of the police and citizen, and instead provided an objective standard: "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States* v. *Mendenhall*, 446 U.S. at 554 (Opinion of Stewart, J.); *accord*, *Michigan* v. *Chesternut*, 486 U.S. at 573; *INS* v. *Delgado*, 466 U.S. 210, 215 (1984); *Florida* v. *Royer*, 460 U.S. 491, 502 (1983) (plurality opinion); *id.* at 514 (dissenting opinion).

We do not seek to overturn or modify in any way the *Mendenhall* standard. We can think of no better test to identify a show of authority from the almost infinite range of contacts between citizens and police. As Justice Stewart wisely observed in *Mendenhall*, "characterizing every street encounter between a citizen and the police as a 'seizure,' while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices." 446 U.S. at 554. The *Mendenhall* objective standard "allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment" and "also ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached." *Michigan* v. *Chesternut*, 486 U.S. at 574.

But any test which places a vast array of combinations of circumstances into only two categories

(seizure, no seizure) will have its limitations. It is necessarily imprecise because it assesses the coercive effect of police conduct, taken as a whole, instead of focusing in isolation on discrete details of the police activity. *Michigan* v. *Chesternut*, 486 U.S. at 573. Further, although the test is characterized as "objective," this Court, and only this Court, can decide whether a reasonable person would have felt free to leave. This determination is based on the host of factors which a police officer must evaluate in a matter of seconds. "[W]hat constitutes a restraint on liberty . . . will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs." *Id.* at 573. Thus, because an officer will not know whether a given set of facts will constitute a restraint until the Court so declares, it is inaccurate to conclude that the *Mendenhall* objective standard provides a reliable predictor for the officer in the street.[1]

---

1. In this sense it is reminiscent of the redefinition of a search announced in *Katz* v. *United States*, 389 U.S. 347 (1967). In *Katz*, of course, this Court discarded the standard of "constitutionally protected area" in favor of a "reasonable expectation of privacy." Compare *id* at 353, with *id*. at 361 (Harlan, J., concurring). Although the *Katz* reformulation was arguably necessary to protect the right of privacy in this age of high technology, this Court must periodically identify which expectations of privacy are "reasonable." *E.g., Florida* v. *Riley*, 488 U.S. 445 (1989); *California* v. *Greenwood*, 486 U.S. 35 (1988); *Dow Chemical Co.* v. *United States*, 476 U.S. 227 (1986); *California* v. *Cirado*, 476 U.S. 207 (1986). Perhaps for purposes of providing predictability as well as continuity, this Court has not abandoned the familiar points of reference provided by property concepts in determining whether official conduct is a search. *Rakas* v. *Illinois*, 439 U.S. 128, 143 n. 12 (1978); *see Oliver* v. *United States*, 466 U.S. 170 (1984).

Application of the *Mendenhall* test to the facts of this case demonstrates the limited utility of that standard in certain contexts. Specifically, the question whether a reasonable person would have believed that he was not free to leave necessarily assumes that he has *not* left. That is, the factual predicate for application of the *Mendenhall* test is stationary acquiescence in the officer's show of authority. Seizure denotes "an intentional acquisition of physical control." *Brower* v. *County of Inyo*, ___ U.S. ___, 103 L.Ed.2d 628, 635 (1989). Where, as here, the citizen has attempted to run from the officer, the *Mendenhall* test can have no relevance. The citizen is not under the officer's physical control. We must look elsewhere for guidance to determine whether a seizure has occurred.

We therefore turn to the second element of a seizure, the restraint upon liberty. Both respondent and *amicus* National Association of Criminal Defense Lawyers (NACDL) argue that physical restraint is unnecessary to effect a seizure. "Yet, it is obvious that restraint on a citizen's liberty may occur, before he is actually brought to a halt." (Resp. Br. at 22.) "However, *Terry* does not say that the citizen himself must be physically restrained." (*Amicus* NACDL Br. at 19.) It appears that all parties agree that a seizure requires an official restraint upon

one's liberty, but disagree about nature and extent of that restraint.

To begin with, we reiterate that a seizure does not require the use of physical force. An officer can seize a citizen without placing his hands or mechanical devices upon him. If an officer commands a citizen to "halt, in the name of the law" (show of authority), and the citizen ceases to walk (restraint upon liberty), a seizure has occurred. The citizen remains physically able to walk away, but his stationary submission to a show of authority amounts to a detention under *Terry* and *Mendenhall*. The next issue is the extent of restraint which, together with a contemporaneous show of authority, constitutes a detention.

Just as *Mendenhall* defines a cognizable display of authority under the Fourth Amendment, *Brower* v. *County of Inyo, supra,* explicates the concept of restraint. Respondent (Brief at 23), *amicus* NACDL (Brief at 16), the state court of appeal (J.A. at 135), and Professor LaFave (3 LaFave, Search and Seizure § 9.2(h), pp. 39-40 [2d.Ed. 1987, Supp. 1990]) all dispute the relevance of *Brower*, dismissing it as "a civil rights case." That is true, but it construed the Fourth Amendment, the identical article of governance which the Court must apply in this case. This Court has declared many times that 42 U.S.C. § 1983 is not a source of substantive rights but merely provides "a method for vindicating federal rights elsewhere conferred." *Baker* v. *McCollan*, 443 U.S. 137, 144 n.3 (1979). This Court has relied upon its criminal Fourth Amendment cases in defining a citizen's right to damages under § 1983. *See, e.g., Graham* v. *Connor*, ___ U.S. ___, 104 L.Ed.2d 443 (1989); *Malley* v. *Briggs*, 475 U.S. 335

(1986). Respondent has suggested no reason why cases decided under § 1983 should not inform the reach of the Fourth Amendment in a criminal context.

Brower defined a seizure as "a governmental termination of freedom of movement *through means intentionally applied.*" 103 L.Ed.2d at 635 (emphasis in original). Assuming without conceding the relevance of *Brower*, respondent argues that the foregoing definition is satisfied when a citizen is not free to move wherever he wants. Thus, if the police block a path, he is seized despite the availability of other avenues of travel. We contend that a seizure under *Brower* occurs when a person is unable to move at all, or when he moves at the specific direction of the police.[2] Both law and logic support our view.

Another passage in *Brower* characterized a seizure as the "intentional acquisition of physical control." 103 L.Ed.2d at 635. A person who can avoid police interference with his movement by choosing another path is not under their control despite their blockage of an avenue which otherwise would have been available to him. A simple example will serve to illustrate the validity of this principle. Assume that Main Street between Second and Third Avenues has been closed to traffic by firefighters who are combating a blaze on Main. A person who is walking up Main Street from First to Second Avenue cannot continue his direct route to Third

---

2. For example, if an officer tells a person to "come here, in the name of the law," and the person complies, he is seized, because he has taken a path which the officer has chosen.

Avenue. He must turn left or right on Second Avenue, or turn and retrace his steps to First Avenue. As we understand the position of respondent and his *amici*, the pedestrian has been "seized" because his movement has been "influenced" by the fire fighting personnel. He may not go where he wishes as a result of a show of authority by the officials who have blocked Main Street between Second and Third Avenues. Our response is that the pedestrian has not been seized because he may take routes over which there is no governmental control. The availability of other avenues of movement, and the selection by the citizen of one of them, betoken the absence of control which is the hallmark of a seizure under the Fourth Amendment.[3/]

---

3. The mere fact that governmental action has reduced the options for movement does not by that token mean that the choices still available are governmentally dictated. Citing *United States* v. *Place*, 462 U.S. 696 (1983), *amicus* NACDL argues that interference with a person's itinerary is a seizure. (*Amicus* Br. at 19-20 n.5.) *Place* correctly observed that a seizure of luggage is tantamount to a seizure of the traveler because he would be unwilling to leave without his belongings. 462 U.S. at 708. Placed in the *Mendenhall-Brower* analytical framework, the seizure of the luggage is a show of authority; the decision to remain at the airport awaiting its release is a submission to authority and thus an acquisition by police of physical control over the traveler -- a seizure. But the traveler had the option of leaving the airport; *if he took that option*, there would have been no seizure -- because no stationary acquiescence to a show of authority.

Finally, respondent argues that this argument was foreclosed by *Michigan* v. *Chesternut*, *supra*, which seemingly rejected the State of Michigan's argument that "the Fourth Amendment is never implicated until an individual stops in response to the police's show of authority. Thus, the [State of Michigan] would have us rule that a lack of objective and particularized suspicion would not poison police conduct, no matter how coercive, as long as the police did not succeed in actually apprehending the individual." 486 U.S. at 572. Respondent is incorrect in two respects.

First, this Court left "to another day the determination of the circumstances in which police pursuit could amount to a seizure under the Fourth Amendment." *Id.* at 575-576 n.9. Instead, the Court merely held that the officer had not exhibited a display of authority which would have led a reasonable person to believe that he or she was not free to leave. Second, we have not argued that a chase *never* implicates the provisions of the Fourth Amendment until the citizen is apprehended. Rather, we have urged that *he* is not seized until he is restrained or halts in submission to a display of authority. If he discards incriminating evidence in reasonable anticipation that he will be searched, then his conduct is constitutionally attributable to the police officer, who has effected a seizure of the *object*. That is the teaching of *Brower*.

Respondent and *amici* err in arguing that we are urging this Court to discard settled precedent in favor of radical and unworkable new principles. *Terry*, decided over 20 years ago, set forth the two requirements of restraint and governmental act as elements of a seizure.

Mendenhall defined the parameters of a show of authority; *Brower* explicated (but did not create) the requirement of a physical restraint. In fact, it is respondent who advocates the overruling of settled doctrine in his contention that a person who is not within the control of police officers is somehow "seized."

B. Petitioner's Test Provides a Bright Line and Is Faithful to the Fourth Amendment.

Respondent and his *amici* insist that we have proposed an unworkable rule which will engender extensive litigation. In fact, it is respondent who is relying upon an untenable concept of a seizure. In respondent's view, if an officer says to a pedestrian, "Stop, in the name of the law," that person is seized regardless of his consequent response. Thus, if he runs from the officer, he is still seized, presumably because the officer has influenced the direction of his movement (away from the officer). It is not at all clear, however, at what point he is no longer seized. When he and the officer no longer see each other? When he reaches home or some other place of apparent safety? When he no longer reasonably feared police capture? If he tried to avoid the area which the officer patrolled but was free to go elsewhere, would he be seized because the officer "influenced" the direction of his travel? If he saw his likeness on a poster in a post office, would he be seized? Respondent's position would lead to patently absurd results.

Respondent argues that under our view of *Terry*, "[t]here would still be endless litigation over whether a suspect has come to a complete step or otherwise manifested his acquiescence in the seizure. Further, such

a rule certainly will not serve the purposes of the Fourth Amendment since it will shift the inquiry from the behavior of the police -- the core concern of the Amendment -- to the subjective reasons of a particular suspect." (Resp. Br. at 25-26; *see also amicus* NACDL Br. at 11.) Respondent is wrong on several counts.

First, we do not believe that the issue of physical restraint will require "endless litigation." Police control over a person is an easily ascertainable objective circumstance. If a person has submitted to an official show of authority, he is seized. It is as simple as that. Nor does the present rule require an exploration of the subjective thought processes of the citizen. His behavior consistent with the display of authority establishes a seizure under the Fourth Amendment. Both the action of the police and the reaction of the citizen are measured against an objective standard. The officer's conduct which would indicate to a reasonable person that he or she is not free to leave objectively indicates the officer's intent to seize. The citizen's reaction in submission to the display of authority objectively indicates his acquiescence to the display and thus consummates the seizure. We simply do not perceive in this simple two-step inquiry the difficulties envisioned by respondent and his *amici*. It certainly does not yield the absurd results which respondent's open-ended rule would produce.[4/]

---

4. Even under respondent's view of the Fourth Amendment, he was not seized because, as we explained in our Opening Brief, a police officer running down the street does not "seize" everyone who happens to be in his path. (Pet. Br. at 25-31.) Respondent asserts that he

C. **Respondent's Rule Would Not Significantly Deter Police Misconduct.**

The heart of the dispute between the parties is whether police pursuit of citizens sufficiently threatens a common sense of security that it must be denominated a seizure in order to permit judicial control of that practice. In other words, are the exclusionary rule considerations present in this form of police-citizen encounter so grave that they must inform the scope of the right of privacy? Although it is difficult to dispute the occasional influence of this proposition in the resolution of Fourth Amendment claims (*see* 1 LaFave, *supra*, § 2.1(d), at pp. 313-314; A. Amsterdam, Perspectives on the Fourth Amendment, 58

"apparently knew the police were after him. It is reasonable to assume that, when Hodari saw the officer running toward him, he understood that the officer was connected to the brown Dodge he had seen moments earlier." (Resp. Br. at 15-16.) Even if it is assumed that respondent knew that the passengers in the unmarked car were officers (Resp. Br. at 15 n.4) -- a finding not made by the state courts -- respondent's argument requires an additional finding that he knew that the officers in the car "were after him." But the state court of appeal *expressly* found that he had no such knowledge (J.A. 133), a finding which finds fair support in the record. *Cf.* 28 U.S.C. § 2254(d); *Sumner* v. *Mata*, 449 U.S. 539, 546 (1981) (appellate court may make findings of fact). The state court's determination of the presence of an official display of authority was based solely upon the proposition that *any* police officer who runs toward *any* citizen has effected a seizure. It is that proposition which we contend finds no support in this Court's decisions.

Minn.L.Rev. 349, 403 [1974]), it is circumscribed by the overriding concern of the efficacy of the exclusionary rule in any given case. Speaking for the Court in *Terry* v. *Ohio*, Chief Justice Warren observed:

> "Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime. Doubtless some police 'field interrogation' conduct violates the Fourth Amendment. But a stern refusal by this Court to condone such activity does not necessarily render it responsive to the exclusionary rule. Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal." 392 U.S. at 13-14 (fns. omitted).

Both respondent and *amicus* NACDL argue that the requirement of physical control would exempt from judicial control "all instances of egregious or harassing police conduct lacking in actual physical restraint. . . ." (*Amicus* NACDL Br. at 15; *see also* Resp. Br. at 29.) Therefore, the argument runs, police can be deterred from engaging in street chases only by declaring them to

be seizures and suppressing their fruits. This argument suffers from several fatal flaws.

First, respondent and his *amici* all assume that all chases based upon less than reasonable suspicion have an illegal purpose and therefore all should be forbidden. That proposition is itself based upon an assumption that the officer is chasing, not merely following, the citizen. Respondent offers no criteria to determine when permissible "surveillance" (*see United States* v. *Knotts*, 460 U.S. 276, 281-285 [1983]) becomes a "chase."

Second, even if this formidable obstacle of predictable categorization could be overcome, we dispute the assumption that all chases have an illegal purpose. In fact, the officer may wish only to look at the citizen's face (*cf. United States* v. *Dionisio*, 410 U.S. 1, 14 [1973]), ask him about a crime which he may have witnessed but not perpetrated, or request directions to an unfamiliar destination. Not all police-citizen encounters involve the investigation of a crime committed by the citizen whom the officer is following or the "acquisition of evidence relating to the violation of a criminal statute." *Cady* v. *Dombrowski*, 413 U.S. 433, 441 (1973). Respondent ignores the very different reasons which police may have to pursue a citizen, insisting that all should be forbidden regardless of motive. Such an indiscriminately broad rule would unduly hamper both the investigating and caretaking functions of the police without providing a corresponding amount of protection to the privacy and security of the citizenry.

Finally, the most basic flaw in respondent's argument lies in his assumption that most if not all chases end in searches. Therefore, he concludes, the officers who

chased him must have had the same intent, and it is necessary to deter them and their brethren by suppression of the desired fruits of their misconduct. Respondent's assumption does not accurately reflect the reality of this case in particular or of the real urban world in general. Police do not frisk everyone they detain (3 LaFave, *supra*, § 9.4, p. 505 n.26), and no evidence appears in this record that Officer Pertoso intended to search respondent and manifested this intent to him. In the absence of empirical data to support his position, respondent is urging a conclusive presumption of intent. Such a presumption would not foster the purposes of the exclusionary rule for the following reason.

As stated above, it is simply not true that each detention results in a search and recovery of incriminating evidence. *Id.* An officer who is pursuing a person on the street with no thought of searching him will not be deterred by the possibility that evidence discarded by the citizen will be suppressed. We do not argue that the police officer will disregard the commands of the Fourth Amendment but that he will believe that the exclusionary rule is inapplicable to his activity. As *Terry* suggests, an officer not interested in searching for evidence is unlikely to be influenced by the suppression of accidentally discovered evidence. Only an officer who pursues with the intent to search would be deterred by suppression of evidence seized in similar circumstances.

Therefore, evidence should be suppressed only if it is discarded by a citizen who reasonably believes that the pursuing officer, acting without reasonable suspicion, intends to search him. Such a rule would discourage police officers from chasing citizens with the intent to

seize and search them without cause. It would not deter a police officer from chasing for the purpose of harassment, but respondent's rule would have no significant deterrent effect either, if the officer does not care about the evidence. The rule also would not reach the officer who secretly intends to search but does not communicate that intent. *See Michigan* v. *Chesternut*, 486 U.S. at 575 n.7. The citizen is not without redress, however, for he has the remedy of suppression if the officer actually seizes and searches him. But, for reasons explained in Argument II, his anticipation of a search is unreasonable in the absence of a manifested intent and therefore cannot be fruit of the poisonous tree. Therefore, the present remedy of suppression of evidence which is seized after a personal search is both appropriate and adequate.

ARGUMENT

II.

THE ABANDONMENT OF THE COCAINE WAS NOT THE FRUIT OF THE POISONOUS TREE.

We have argued that even if respondent had been detained unlawfully, his abandonment of the rock of cocaine was not the fruit of the poisonous tree because Officer Pertoso had not manifested an intent to commit the additional intrusion of searching him. This Court's cases teach that an intent to gather evidence is an indispensable element which connects, for constitutional purposes, a prior illegality with the subsequent discovery of evidence -- either tangible fruits, statements, or the testimony of a witness. Respondent disputes this analysis (Resp. Br. at 32), arguing that if the officers "expect[ed]" respondent to discard his contraband, it was fruit of the poisonous tree. (*Id.* at 39.) Neither the cases which he cites nor the record supports his position.

Brown v. *Illinois*, 422 U.S. 589 (1975), identified several factors which determined whether a confession was obtained by the exploitation of an illegal arrest. They included temporal proximity between arrest and confession, the presence of intervening circumstances, and, particularly, the purpose of the official misconduct. *Id.* at 605. Both parties agree that *Brown* articulates the relevant criteria, but dispute their application to the facts of this case. The record clearly establishes that the officers did not at any time communicate to respondent an

intent to search him. Absent proof of such intent, which a criminal defendant must adduce to establish the exploitative nexus between the prior illegality and the challenged evidence (*Alderman* v. *United States*, 394 U.S. 165, 183 [1969]), as a matter of law that evidence is not the fruit of the poisonous tree. The prosecution is not required to show the presence of some independent intervening cause which breaks the nexus because that connection was not shown to exist in the first place.

Respondent places great reliance upon the *Brown* line of authority (*Brown* v. *Illinois*, 422 U.S. 590; *Lanier* v. *South Carolina*, 474 U.S. 25 [1985]; *Taylor* v. *Alabama*, 457 U.S. 687 [1982]; *Dunaway* v. *New York*, 442 U.S. 189 [1979]), but these cases, while correctly decided, are inapplicable. All involved questioning -- an attempt to gather evidence -- while the suspect was illegally arrested. Indeed, the officers arrested the defendant in *Brown* for that express purpose. 422 U.S. at 605. To deter such illegal evidence-gathering techniques, the Court declined to hold that advisement of warnings under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), was sufficient to attenuate the taint of an unconstitutional arrest. Otherwise, "[a]ny incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a 'cure-all'. . . ." 422 U.S. at 602.

To illustrate the inapplicability of the salutary principle announced in *Brown*, we alter the facts to assume that the officers arrested the defendant without any intent to question him. If the arrestee spontaneously uttered an incriminating admission on the way to the station house, *Brown* would not preclude its admission at trial. By parity of reasoning, evidence discarded by a

detainee to whom the officers did not communicate an intent to search should also be admissible.

The resolution of this issue is plainly controlled by *Brower* v. *County of Inyo*, ___ U.S. ___, 103 L.Ed.2d 628 (1989); and *Hester* v. *United States*, 265 U.S. 57 (1924). In *Hester*, the defendant dropped a bottle of illegally distilled liquor while being chased by revenue officers, who thereupon recovered the bottle. In holding that the recovery was not a seizure under the Fourth Amendment, this Court relied upon two principles, both necessary to the disposition of the case. First, the defendant's abandonment was not a seizure because "[t]he defendants own acts, and those of his associates disclosed the [incriminating evidence.]" *Id.* at 58. This view was recently confirmed in *Brower* v. *County of Inyo, supra*, which observed that "even though the incriminating containers were unquestionably taken into possession as a result (in the broad sense) of action by the police, the court had held that no seizure had taken place." 103 L.Ed.2d at 636. Second, the officers' recovery of the bottles on the property of the defendant's father was not a seizure because it occurred in an "open field." 265 U.S. at 59. This principle was later confirmed in *Oliver* v. *United States*, 466 U.S. 170 (1984).

The first principle, of course, is directly relevant to this case. It supports our position that an object discarded by a citizen who fears capture is not seized unless the officer has communicated an intent to take that object. The fact that the officer intends to detain the person does not alone suffice to indicate an intent to search. Even assuming that the officer communicated to respondent an intent to detain him, he did not additionally

indicate an intent to conduct a search sufficiently intensive to uncover the rock of cocaine.

Respondent disputes the relevance of *Hester*, arguing that the seizure issue would have been decided differently under fruit of the poisonous tree analysis. That doctrine's roots can be traced not to *Wong Sun* v. *United States*, 371 U.S. 471 (1963), as respondent claims (Resp. Br. at 47), but to *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920), a case decided four years before *Hester* and written by the same author: Justice Holmes. Thus, there is no merit to respondent's claim that the Court in *Hester* was ignorant of the "fruits" doctrine when it ruled that the defendant's acts were the cause of the recovery of the evidence.

More fundamentally, respondent's abandonment of the cocaine was not fruit of the poisonous tree for precisely the same reason that it was not a seizure in the first place: the officers did not manifest an intent to search him. Respondent is reduced to arguing that "it is quite foreseeable that a defendant faced with an illegal detention will try to discard contraband" (Resp. Br. at 37); and the officers "hoped their actions would provoke Hodari into a panic thereby inculpating himself. . . ." (Resp. Br. at 39.) It is unnecessary to quarrel about the question of forseeability, which connotes notions of negligence liability, because a seizure requires something more: an intent to gain control of the object in question. Nor are the "hopes" of the officers at all relevant, because uncommunicated intent plays no part in Fourth Amendment seizure analysis.

The decision in *Hester* is consistent with the Court's later evaluation of the "fruits" doctrine. The Court has

made clear that there is no"per se" or "but for" rule excluding evidence that comes to light through a causal chain beginning with an illegal seizure. *New York* v. *Harris*, 110 S.Ct. 1640, 1642 (1990); *United States* v. *Ceccolini*, 435 U.S. 268, 276 (1978). Yet that is precisely what respondent asks the Court to conclude in this case. Respondent's decision to discard the crack cocaine was not materially different from Hester's decision to drop the jug of "moonshine." Each act was an "independent act of free will" in the sense meant by *Wong Sun* because each was not the action ordered by the police, and each was not the only and necessary response to the officers' command. The officers did not expressly or implicitly order respondent to empty his pockets; at most, Officer Pertoso simply "ordered" respondent to stop. It was respondent who decided that, if he was going to be stopped, he did not want to have the cocaine on him. Perhaps respondent believed (mistakenly, it turned out) that he could throw away the cocaine without being seen; perhaps respondent believed (again mistakenly) that he could not be charged with drug possession if the drugs were not on his person. But in either case it was respondent's mistaken belief, and not Officer Pertoso's pursuit of respondent, that led him to jettison the cocaine. Respondent's misapprehension about the consequences of discarding the cocaine does not vitiate the voluntariness of his actions. *Cf. Connecticut* v. *Barrett*, 479 U.S. 523, 530 (1987).

CONCLUSION

The judgment of the California Court of Appeal for the First District should be reversed.

DATED: January 4, 1991

JOHN K. VAN DE KAMP,
Attorney General of the
State of California
RICHARD B. IGLEHART
Chief Assistant Attorney General
JOHN H. SUGIYAMA
Senior Assistant Attorney General
MORRIS BEATUS
Deputy Attorney General
RONALD E. NIVER
Deputy Attorney General

Attorneys for Petitioner